

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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| In the Matter of the Petition                | : |                       |
| of   | : |                       |
| <b>RINALDO AND KATHERINE LORUSSO</b>         | : | <b>DETERMINATION</b>  |
|  | : | <b>DTA NO. 814788</b> |
| for Redetermination of a Deficiency or for   | : |                       |
| Refund of Personal Income taxes under        | : |                       |
| Article 22 of the Tax Law for the Year 1988. | : |                       |

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Petitioners, Rinaldo and Katherine LoRusso, 107 West Oak Street, Rome, New York, 13440 filed a petition for refund of personal income tax under Article 22 of the New York Tax Law for the year 1988.

The Division of Taxation, represented by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, of counsel), filed a motion for summary determination, dated May 21, 1996, in the above-captioned case. Petitioners' response to the motion was due by July 24, 1996. Petitioners did not respond. Based on the affidavits of Peter T. Gumaer and Charles Bellamy, and the motion papers attached thereto, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation may assert the limitations period of Tax Law § 687(a) to bar petitioners' refund claim for taxes paid on Federal pension income.

***FINDINGS OF FACT***

1. Petitioners, Rinaldo and Katherine LoRusso, filed a claim for refund, dated July 26, 1994, for the tax year 1988. In that claim, petitioners asserted that they were entitled to a refund in the amount of \$625.00 with respect to the taxation of income from a Federal retirement pension for the tax year 1988.

2. In its motion papers, the Division of Taxation ("Division") filed an affidavit by Charles Bellamy, a tax technician for the Division of Taxation ("Division") responsible for the

reviewing and processing of refund claims made by Federal pension recipients. In that affidavit, Mr. Bellamy stated that petitioners filed a refund claim for the year 1988 on August 10, 1994 and that petitioners were issued a notice of disallowance because they failed to file a refund claim or amended return within three years of filing the original return which was filed on or before April 15, 1989.

3. Petitioners filed a request for a conciliation conference. In that request, petitioners protested the taxation of their income from the Federal retirement pension for the year 1988. Petitioners contended that because of misinformation regarding the taxability of Federal pensions, New York State should have informed each Federal retiree, as he or she appeared on the New York State tax roll, that he or she was entitled to a refund. The conciliation conferee issued to petitioners a Conciliation Order (CMS No. 145432), dated December 8, 1995, sustaining the refund denial. In the caption of the Conciliation Order, there was the statement "Notice of Disallowance Dated November 28, 1994".

4. Mr. and Mrs. LoRusso filed a petition, dated January 22, 1996, for a refund of \$996.00 for taxes they paid in 1988. Petitioners alleged that they were never notified or even heard about a refund due to them until it was too late. Attached to the petition was an article entitled "Federal retirees would benefit from the Sears bill". In the article, there was a discussion of Senator Sears' introduction of legislation to assist state residents who retired from the Federal government and were unable to obtain refunds of state taxes on their pensions between 1985 and 1988 because of the three-years limitations period for seeking refunds. It was noted that the legislation was aimed at correcting the problem faced by many Federal retirees who, despite the U.S. Supreme Court ruling that the State's taxing of income from Federal pensions was discriminatory, could not obtain a refund of the illegally collected taxes because those retirees did not file refund claims earlier or "did not realize they needed to file, or were told by the state tax officials it wasn't necessary".

5. The Division filed an answer, dated April 24, 1996, affirmatively stating, inter alia, that because petitioners failed to file a claim for the refund within three years of the filing of the

1988 return, the refund claim was denied as untimely pursuant to Tax Law § 687, and that petitioners bore the burden of proving the disallowance was erroneous or improper.

6. In its motion for summary determination, the Division noted that in the U.S. Supreme Court's decision in Davis v. Michigan Department of Treasury (489 US 803, 103 L Ed 2d 89), the Court declared unconstitutional State taxation of Federal retirement benefits if that State exempted from taxation State retirement benefits. The Division argued that subsequent to the Davis decision, the U.S. Supreme Court determined that refund provisions with a three-year limitations period were adequate post-deprivation remedies to correct the prior collection of tax on Federal pensions by New York State. The Division also contended that summary determination was warranted because there are no material and triable issues of fact.

### ***CONCLUSIONS OF LAW***

A. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b) after issue has been joined. The regulations provide that the motion may be granted if the movant has sufficiently established that no material and triable issue of fact is present, and the motion may be denied "if any party shows facts sufficient to require a hearing of any material and triable issue of fact" (Kuehne & Nagel, Inc. v. Baiden, 36 NY2d 544, 369 NYS2d 667, 671). "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*id.*).

In the affidavit of Charles Bellamy, he stated that petitioners' claim for refund with respect to their 1988 New York State personal income tax return was not filed until August 10, 1994, more than three years from the filing of the 1988 return. Mr. Bellamy also stated that the Division issued a notice of disallowance of the refund claim because they failed to file the claim within three years of filing the original return. Although the Division did not submit any other proof to verify these facts, petitioners have not controverted these facts, and therefore, they are deemed admitted. Thus, it appears that there are no material or triable issues of fact in dispute and that the only issue on this motion is whether the three-year statute of limitations of Tax Law § 687(a) bars petitioners' refund claim for 1988.

B. In 1989, the U.S. Supreme Court held in Davis v. Michigan Dept. of Treasury (*supra*) that a tax scheme that exempts retirement benefits paid by the State but does not exempt retirement benefits paid by the Federal Government violates the constitutional intergovernmental tax immunity doctrine. In Harper v. Virginia Dept. of Taxation (509 US 86, 125 L Ed 2d 74 [1993]), the Supreme Court further held that the ruling in Davis applies retroactively and that States which violated the tax immunity doctrine must provide a "meaningful backward-looking relief to rectify any unconstitutional deprivation" (Harper v. Virginia Dept. of Taxation, *supra*, at 99, 125 L Ed 2d at 89, quoting, McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 US 18, 31, 110 L Ed2d 17). A State may provide such relief by awarding refunds to those illegally taxed or provide some other relief that "create[s] in hindsight a nondiscriminatory scheme" (McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, *supra*, at 40, 125 L Ed 2d at 38). Applying this principle, the U.S. Supreme Court found that the State of Georgia had not provided a taxpayer "meaningful backward-looking relief" when it construed a refund statute not to apply to the taxpayer on the ground that the law under which taxes were assessed and collected was subsequently declared unconstitutional (Reich v. Collins, 513 US \_\_, 130 L Ed2d 454).

In this case, the issue is whether the three-year statute of limitations provision of Tax Law § 687(a) may constitutionally be applied to bar petitioners' requested refund of the taxes they paid for the 1988 tax year. Postdeprivation remedies, such as refund provisions, must satisfy minimum due process requirements, however, the State is free to impose various procedural requirements for postdeprivation relief including the enforcement of a statute of limitations (McKesson v. Division of Alcoholic Beverages & Tobacco, *supra*). In McKesson, the Court indicated that the purpose of such procedural protections was "to secure the State's interest in stable fiscal planning when weighted against its constitutional obligation to provide relief for an unlawful tax" (*id.* at 41, 110 L Ed 2d at 39, citing, Ward v. Love County Board of Commrs, 253 US 17, 25, 64 L Ed 2d 751).

Although it is understandable that petitioners may not have been aware of the Davis decision until 1994 when petitioners filed for a refund, there is no statutory or other legal requirement that the State must notify taxpayers that they may be entitled to a refund. The Division's denial of the refund request for the 1988 tax year, on the ground that the refund is barred by the three-year statute of limitations contained in Tax Law § 687(a), is consistent with the U.S. Supreme Court decisions in Davis and its progeny. Therefore, the Division is entitled to summary determination based on the federal case law.

C. The Division of Taxation's motion for summary determination is granted and the petition of Rinaldo and Katherine LoRusso is denied.

DATED: Troy, New York  
October 10, 1996

/s/ Marilyn Mann Faulkner  
ADMINISTRATIVE LAW JUDGE